IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

M.W., a minor, by RYAN WAGNER and WHITNEY BROSCIOUS, his parents, Plaintiffs, v. SHIKELLAMY SCHOOL DISTRICT, Defendant.	No. 4:20-CV-0018 (Judge Brann)

MEMORANDUM OPINION

APRIL 7, 2020

I. BACKGROUND

On December 26, 2019, Plaintiffs (M.W., a minor, and his parents, Ryan Wagner and Whitney Broscious) filed a complaint in the Court of Common Pleas of Northumberland County, Pennsylvania.[1] Count I alleges that Defendant Shikellamy School District violated Title IX, 20 U.S.C. § 1681.[2] Count II alleges that Shikellamy violated 42 U.S.C. § 1983.[3]

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1 *See* Doc. 1-1.

2 Doc. 1-1 at ¶¶ 11-21.

3 Doc. 1-1 at ¶¶ 22-28. At first, Plaintiffs requested punitive damages on each of these counts; Plaintiffs have recently withdrawn this request. *See* Docs. 1-1, 12 at 12.

Shikellamy removed Plaintiffs' case to this Court.[4] Now Shikellamy moves to dismiss Plaintiffs' complaint for failure to state a claim.[5] The Court grants Shikellamy's motion. Plaintiffs will have the opportunity to amend their complaint.

II. DISCUSSION

A. Motion to Dismiss Standard

Under Federal Rule of Civil Procedure 12(b)(6), the Court dismisses a complaint, in whole or in part, if the plaintiff has failed to "state a claim upon which relief can be granted." A motion to dismiss "tests the legal sufficiency of a pleading"[6] and "streamlines litigation by dispensing with needless discovery and factfinding."[7] "Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law."[8] This is true of any claim, "without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one."[9]

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4 *See* Doc. 1.

5 *See* Doc. 5.

6 *Richardson v. Bledsoe*, 829 F.3d 273, 289 n.13 (3d Cir. 2016) (Smith, C.J.) (*citing Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675 (7th Cir. 2001) (Easterbrook, J.).

7 *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989).

8 *Neitzke*, 490 U.S. at 326 (*citing Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

9 *Neitzke*, 490 U.S. at 327.

Following the Roberts Court's "civil procedure revival,"[10] the landmark decisions of *Bell Atlantic Corporation v. Twombly*[11] and *Ashcroft v. Iqbal*[12] tightened the standard that district courts must apply to 12(b)(6) motions.[13] These cases "retired" the lenient "no-set-of-facts test" set forth in *Conley v. Gibson* and replaced it with a more exacting "plausibility" standard.[14]

Accordingly, after *Twombly* and *Iqbal*, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[15] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[16] "Although the plausibility standard does not impose a probability requirement, it does require a pleading to show more than a sheer possibility that a defendant has acted unlawfully."[17] Moreover, "[a]sking for plausible grounds . . . calls for enough facts

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10 Howard M. Wasserman, THE ROBERTS COURT AND THE CIVIL PROCEDURE REVIVAL, 31 Rev. Litig. 313, 316, 319-20 (2012).

11 550 U.S. 544 (2007).

12 556 U.S. 662, 678 (2009).

13 *Iqbal*, 556 U.S. at 670 (*citing Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)) ("[a]cknowledging that *Twombly* retired the *Conley* no-set-of-facts test").

14 *Id.*

15 *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

16 *Id.*

17 *Connelly v. Lane Const. Corp.*, 809 F.3d 780 (3d Cir. 2016) (Jordan, J.) (internal quotations and citations omitted).

to raise a reasonable expectation that discovery will reveal evidence of [wrongdoing]."[18]

The plausibility determination is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[19] No matter the context, however, "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'"[20]

When disposing of a motion to dismiss, the Court "accept[s] as true all factual allegations in the complaint and draw[s] all inferences from the facts alleged in the light most favorable to [the plaintiff]."[21] However, "the tenet that a court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions."[22] "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."[23]

As a matter of procedure, the United States Court of Appeals for the Third Circuit has instructed that:

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[18] *Twombly*, 550 U.S. at 556.

[19] *Iqbal*, 556 U.S. at 679.

[20] *Iqbal*, 556 U.S. at 678 (*quoting Twombly*, 550 U.S. at 557 (internal quotations omitted)).

[21] *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008) (Nygaard, J.).

[22] *Iqbal*, 556 U.S. at 678 (internal citations omitted); *see also Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (Nygaard, J.) ("After *Iqbal*, it is clear that conclusory or 'bare-bones' allegations will no longer survive a motion to dismiss.").

[23] *Iqbal*, 556 U.S. at 678.

> Under the pleading regime established by *Twombly* and *Iqbal*, a court reviewing the sufficiency of a complaint must take three steps. First, it must tak[e] note of the elements [the] plaintiff must plead to state a claim. Second, it should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. Finally, [w]hen there are well-pleaded factual allegations, [the] court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.[24]

B. Facts Alleged in the Complaint

The facts alleged in the complaint, which I must accept as true for the purposes of this motion, are as follows.

Shikellamy operates Beck Elementary School in Sunbury, Pennsylvania.[25] In school year 2016-2017, M.W. was a kindergarten student attending Beck.[26] In late spring 2016, M.W. was sexually accosted by another student while attending gym class. The other student told M.W. he would give M.W. a pair of sunglasses if he could pull down M.W.'s pants and lick his penis.[27] The other student proceeded to pull down M.W.'s pants and perform this sexual act on him.[28]

The above occurred during a gym class in which the staff had left the room unattended.[29] This conduct, and related conduct, had been ongoing for some

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[24] *Connelly*, 809 F.3d at 787 (internal quotations and citations omitted).

[25] Doc. 1-1 at ¶ 4.

[26] Doc. 1-1 at ¶ 5. Wagner and Broscious are M.W.'s parents and reside in Sunbury. Doc. 1-1 at ¶ 2.

[27] Doc. 1-1 at ¶ 6.

[28] Doc. 1-1 at ¶ 7.

[29] Doc. 1-1 at ¶ 8.

period of time during the school year. The school staff was aware of the conduct, but they did not take any corrective action.[30]

C. Analysis

1. Plaintiffs' Title IX Claim

a. Legal Standards

To assert a Title IX claim, a plaintiff must allege: (1) either *quid pro quo* sexual harassment or a sexually hostile environment; (2) he or she provided actual notice to an "appropriate person" who had authority to take corrective measures; and (3) the institution's response to the harassment amounted to deliberate indifference.[31]

An "appropriate person" is "an official who, at a minimum, has authority to address alleged discrimination and to institute corrective measures on the [district's] behalf."[32] "Actual notice must amount to actual knowledge of discrimination in the recipient's programs."[33] "Actual knowledge" requires knowledge of the underlying facts so to sufficiently indicate danger to the student, such that the institution can reasonably be said to be aware of the danger.[34]

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30 Doc. 1-1 at ¶ 9.

31 *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291-92 (1998); *see also, e.g., M.S. ex rel. Hall v. Susquehanna Twp. Sch. Dist.*, 43 F. Supp. 3d 412, 429 (M.D. Pa. 2014).

32 *Bostic v. Smyrna Sch. Dist.*, 418 F.3d 355, 360 (3d Cir. 2005).

33 *Id.*

34 *Id.* at 360-61.

"Further, the response must amount to deliberate indifference to discrimination" – that is, "an official decision by the recipient not to remedy the violation."[35]

A plaintiff must allege a direct causal connection between the harassment and a school district's deliberate indifference, such that the school district can be said to "expose" its students to harassment or "cause" them to undergo the harassment "under the recipient's programs."[36]

b. Analysis

Shikellamy argues that Plaintiff's complaint does not meet the *Twombly*/*Iqbal* pleading standard because it is conclusory and does not set out enough facts to be facially plausible.[37] Shikellamy points to two examples. First, the complaint "does not identify the appropriate person or persons who had actual knowledge of the [complained-of] conduct."[38] Second, the complaint does not allege "deliberate indifference."[39]

As Plaintiffs concede,[40] they have not – at least, not beyond vague, conclusory statements – alleged in a plausible fashion either (a) that they provided actual notice to an appropriate person, or (b) deliberate indifference on

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35 *Id.* at 360.

36 *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 645 (1999).

37 Doc. 8 at 8-9.

38 Doc. 8 at 8.

39 Doc. 8 at 8-9.

40 *See* Doc. 12 at 6-7, 9-10.

Shikellamy's part.[41] The Court must then dismiss Plaintiffs' Count I on this basis. But the Court will allow Plaintiffs the opportunity to amend their complaint.

2. Plaintiffs' Section 1983 Claim

a. Legal Standards

Section 1983 of Title 42 of the United States Code provides a cause of action to redress violations of federal law that state officials commit.[42] Section 1983 does not provide a plaintiff substantive legal rights; rather, it merely allows a plaintiff redress for a defendant's underlying violations of constitutional rights.[43] To establish a claim under Section 1983, a plaintiff must demonstrate that: (1) the conduct complained of was committed by a person acting under the color of state law; and (2) the conduct deprived the complainant of rights secured under the Constitution or federal law.[44]

b. Analysis

Shikellamy argues that the deficiencies that doom Plaintiffs' Title IX claim also doom Plaintiffs' Section 1983 claim. Per Shikellamy, because of the above deficiencies, Plaintiffs cannot maintain a claim that Shikellamy, as a municipal school district, can be held liable under *Monell v. Department of Social Services*.[45]

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41 *See* Doc. 1-1.

42 *See* 42 U.S.C. § 1983.

43 *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815 (1985).

44 *See Sameric Corp. of Delaware, Inc. v. City of Philadelphia*, 142 F.3d 582, 590 (3d Cir. 1998).

45 *See* Doc. 8 at 10-14.

Shikellamy argues that Plaintiffs have not set forth any affirmative policy or custom that Shikellamy maintained.[46] Shikellamy also argues that Plaintiffs have not set forth any deliberate indifference on Shikellamy's part.[47] Plaintiffs argue, in a conclusory fashion, that "there was a policy or custom of not ensuring that younger children were protected from student on student harassment."[48] But Plaintiffs concede that they "are thus far limited in the granular details of the Defendant's policies and customs as no discovery has occurred."[49]

As per the Court's analysis with respect to Count I, Plaintiffs' vague, conclusory complaint does not make out a plausible claim of *Monell* liability against Shikellamy. The Court must then dismiss Count II on this basis. But the Court will – as with Count I – allow Plaintiffs the opportunity to amend their complaint.

III. CONCLUSION

Defendant's Motion to Dismiss pursuant to Rule 12(b)(6) is granted. Plaintiffs are granted leave to amend. Plaintiff will be given twenty-one days from today's date to file an amended complaint. If no amended complaint is filed, the

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[46] *See* Doc. 8 at 14-15.

[47] *See* Doc. 8 at 15-16.

[48] Doc. 12 at 11.

[49] Doc. 12 at 11-12.

action will be summarily dismissed pursuant to Federal Rule of Civil Procedure 41(b).

An appropriate Order follows.

BY THE COURT:

s/ Matthew W. Brann
Matthew W. Brann
United States District Judge